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UNIVERSITY OF TORONTO
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PROGRAM

Canadian Professional Responsibility

CASEBOOK

Fall, 2015-2016

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Federation of Law Societies of Canada
National Committee on Accreditation

Syllabus

Canadian Professional Responsibility

(Revised May 2013)

**Candidates are advised that the syllabus may be updated from
time-to-time without prior notice.**

**Candidates are responsible for obtaining the
most current syllabus available.**



Professional Responsibility

Course Outline

Part I. Introduction and Administration

A. Overview

This is a course prepared for the Federation of Law Societies of Canada ("FLSC"⁽¹⁾), National Committee on Accreditation ("NCA"⁽²⁾). It is designed to cover the fundamental concepts of professional responsibility in the Canadian legal profession.

The regulation of lawyers in Canada is a matter primarily within the jurisdiction of the provinces.⁽³⁾ Because the laws, rules and regulations that govern lawyers, including professional codes of conduct, are currently different for each province and territory, this course does not purport to cover (and students are not expected to read) the different regulatory regimes of all of the different provinces. Rather, for purposes of this course, the FLSC's *Model Code of Professional Conduct* (the "*Model Code*"⁽⁴⁾) will be referred to as the basic and primary model guide for professional conduct in Canada. It is therefore anticipated that each student, after successfully completing this course (including the course examination) will become very familiar with the laws, rules and regulations of the given provincial or territorial jurisdiction in which he or she intends to become a member of the bar.

In addition to the FLSC's *Model Code*, the Canadian Bar Association ("CBA") also provides Canadian lawyers and regulators with a model code: the CBA's *Code of Professional Conduct*.⁽⁵⁾ While the CBA's *Code of Professional Conduct* has some differences (see e.g. in the area of conflicts of interest), the thrust of the two codes is similar.

B. Course Objectives

The course has three main objectives.

Concepts. The first objective is two-fold: to look at what the landscape of the legal profession in Canada is, can, and should be; and then to situate lawyers, their conduct and their dealings with clients and the profession in that landscape. The course also looks more broadly at various aspects of lawyering and the profession, including self-regulation, the nature of the adversary system, demographics and diversity, ethical tensions between zealous representation and a commitment to the public interest and access to justice. The course also looks at the ethical and professional obligations associated with specific practice roles and contexts. Overall, it is hoped that students will develop a sense of what the profession is about and what lawyers' professional roles and responsibilities are in the profession.

(1) Online: FLSC <<http://www.flsc.ca/>>.

(2) Online: FLSC <<http://www.flsc.ca/en/nca/>>.

(3) For a general description and some useful links, see FLSC, "Canada's Law Societies", online: FLSC <<http://www.flsc.ca/en/canadas-law-societies/>>.

(4) FLSC, *Model Code of Professional Conduct*, online: FLSC <<http://www.flsc.ca/en/model-code-of-professional-conduct/>>.

(5) See online: CBA <<http://www.cba.org/cba/activities/code/>>.
For a history of recent amendments, see CBA <<http://www.cba.org/CBA/activities/code/docs.aspx>>.



Skills. The second objective of the course – with specific reference to the *Model Code* – is to help students to think about what professional issues arise in practice, how they arise and how they can – and in some cases must – be dealt with.

Focused Critical Thinking. The third objective of the course is to encourage students to think critically and imaginatively about the legal profession's current and future opportunities and challenges. Thinking about what works, what doesn't and alternatives is encouraged.

C. Format, Materials and Readings

Format. This course is designed to be self-taught. The required readings (see below) provide the basic course materials.

Materials. This course has two primary sources of materials:

- (a) Alice Woolley, Richard Devlin, Brent Cotter and John M. Law, *Lawyers' Ethics and Professional Regulation*, 2d ed. (Markham, ON: LexisNexis, 2012) ["Casebook"]; and
- (b) the *Model Code*.⁽⁶⁾ When reading the *Model Code*, students should read both the rules and the relevant commentaries. Students should also become familiar with the Table of Contents to the *Model Code* and be able to find the various provisions that might apply to a given issue or problem.

Required Readings. The required readings for each topic are set out in this course outline (below). These are the readings that students are expected to read and with which they should become familiar for purposes of the course examination. From time to time further materials are also included as required readings to supplement the materials in the Casebook.

Problems and Issues. Each topic in this course outline has a list of non-exhaustive "issues to consider" that are included to help focus students' thinking when going through the various topics and materials. There are also notes, questions and scenarios included in the Casebook that are useful tools to assist students when reviewing the materials and studying for the course examination.

Further (Optional) Materials. From time to time further (optional) materials are included in this course outline as well as at the end of each chapter of the Casebook. These optional materials are included to provide students with further background information on a given topic and to help students who are looking for more assistance or who want to think further about a given issue. They are not, however, required for purpose of the course examination. As such, they are truly "optional" materials.⁽⁷⁾

⁽⁶⁾ *Supra* note 4.

⁽⁷⁾ For students' background information, in addition to the course materials, there are several other – again not required – sources of materials on professional responsibility in Canada. For very useful and comprehensive sources, see e.g. Allan C. Hutchinson, *Legal Ethics and Professional Responsibility*, 2d ed. (Toronto: Irwin Law, 2006); Alice Woolley, *Understanding Lawyers' Ethics in Canada* (Canada: LexisNexis, 2011); Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, 5th ed. (Toronto: Carswell, 2009); Randal N. M. Graham, *Legal Ethics: Theories, Cases and Professional Regulation*, 2d ed. (Toronto: Emond Montgomery, 2011); Mark Orkin, *Legal Ethics*, 2d ed. (Toronto: Canada Law Book, 2011); Beverley G. Smith, *Professional Conduct for Lawyers and Judges*, 4th ed. (Fredericton: Maritime Law Book, 2011); Donald E. Buckingham et al., *Legal Ethics in Canada: Theory and Practice* (Toronto: Harcourt Brace, 1996). . Students should always check for the most recent edition of each of these materials.



D. EVALUATION

Evaluation for this course is based on a 100%, open-book, written examination. Further details about the examination and grading requirements for this course are available from the NCA.⁽⁸⁾

Part II. Course Outline and Readings

A. The Legal Profession: Lawyers in Society and a Society of Lawyers

Purpose. This first section of the course – Part A – considers two fundamental and recurring general questions: what is the legal profession and what is the role of the lawyer in the profession? These general questions are designed to get students thinking about what the legal profession is and its relationship with (and difference from) other commercial endeavours in society; and the role of the lawyer – specifically including the relevance of personal integrity, morality, honour, etc. – vis-à-vis clients, the profession and the public.

1. Professions and Professionalism: The Business of Law and Law as a Business

Issues to Consider:

- (a) What is a profession?
- (b) What is the “public interest”?
- (c) The role of lawyers and the profession in legal process and the regulation of society.
- (d) Law as a business and law as a profession: what is the difference? Is there a conflict? Must it be a “one-or-the-other” question? What is at stake in this discussion?
- (e) The power, opportunity and responsibility of lawyers in society.
- (f) What is legal ethics? What is the orientation of the lawyer’s value framework? What role do various principles play in determining the obligations of a lawyer? Loyalty? Integrity? Justice?
- (g) Lawyers’ obligations to themselves, clients, the court and society: is there a conflict?
- (h) Lawyers as moral or morally neutral actors: should personal honour, personal morality, etc. play a role in the lawyering process? What are the various arguments on either side of this question? What *Model Code* provisions animate both sides of this question? If there is a conflict, how should it be resolved? Whose morals are we talking about: the lawyer’s, clients’, society’s, others?

Required Readings:

- (a) Trevor C. W. Farrow, “Sustainable Professionalism” (2008) 46 Osgoode Hall Law Journal 51, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1151799>.
- (b) Casebook, Chapter 1.
- (c) *Model Code* (do a general review of the full Code).
- (d) See also CBA, *Code of Professional Conduct*, “President’s Message” at para. 1.⁽⁹⁾

⁽⁸⁾ *Supra* note 2.

⁽⁹⁾ Online: CBA <<http://www.cba.org/CBA/activities/pdf/codeofconduct.pdf>> at page “v”.



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Further (Optional) Materials:

- (a) American Bar Association ("ABA"), *Model Rules of Professional Conduct*, "Preamble and Scope", online: ABA <<http://www.abanet.org/cpr/mrpc/preamble.html>>.
- (b) The Law Society of Upper Canada ("LSUC"), Committee on Professionalism, "Elements of Professionalism", LSUC, online: <<http://www.lsuc.on.ca/media/definingprofessoct2001revjune2002.pdf>>.

2. Regulation of Lawyers and Regulation of the Legal Profession

Issues to Consider:

- (a) The roles and responsibilities of law societies in the governance of the Legal Profession. What are their purposes? Are these purposes being achieved? What alternatives might be considered?
- (b) Structure of the legal profession.
- (c) The source, meaning, opportunity and responsibility of self-regulation.
- (d) Statutory and ethical regimes.
- (e) Education.
- (f) Good character requirement to practice law.
- (g) Accountability and the public interest.
- (h) Competence.
- (i) Admission, conduct and discipline.
- (j) Unauthorized practice.

Required Readings:

- (a) Casebook, Chapters 2, 3(C), 13.
- (b) *Model Code*, Rule 3 and Commentaries; Rule 7-2 and Commentaries.
- (c) Briefly skim the basic governing and regulatory materials for one Canadian jurisdiction.⁽¹⁰⁾

Further (Optional) Materials:

- (a) *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 92.
- (b) LSUC, "Protecting the Public", online: LSUC <<http://www.lsuc.on.ca/with.aspx?id=1063>>.
- (c) *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20 at para. 36.
- (d) LSUC, Task Force on the Independence of the Legal Profession, online: LSUC <http://www.lsuc.on.ca/media/convnov2306_taskforce.pdf>.
- (e) LSUC, "Paralegal Regulation", online: LSUC <<http://www.lsuc.on.ca/with.aspx?id=1069>> (skim various reports).
- (f) FLSC, "Home", online: FLSC <<http://www.flsc.ca/en/>> (skim various materials and links).
- (g) Canadian Legal Information Institute ("CanLII"), online: CANLII <<http://www.canlii.org/>>.

⁽¹⁰⁾ Students should not spend a significant amount of time on this reading assignment. The point is for students simply to become aware of the basic governing and regulatory materials for a given jurisdiction (typically the jurisdiction in which a student plans to practice). For example, if a student were to pick Alberta as the jurisdiction for review, they would link to and skim three sets of materials: the website for the LSA (online: LSA <<http://www.lawsocietyalberta.com/>>), the Alberta Legal Profession Act, S.A. 1990, c. L-8 (online: Alberta Queen's Printer <http://www.qp.gov.ab.ca/documents/Acts/L08.cfm?frm_isbn=0779732790>), and the LSA Code of Conduct (online: LSA <<http://www.lawsociety.ab.ca/lawyers/regulations/code.aspx>>). This exercise is not for students to become fully familiar with each of these sets of materials; rather it is for students simply to become aware of some of the primary governing and regulatory materials in a given jurisdiction. For links to some of these regulatory materials for the various Canadian jurisdictions, see FLSC, "Publications and Resources", online: FLSC <<http://www.flsc.ca/en/resources/>>.



Provincial and Territorial Law Societies (Optional)⁽¹¹⁾:

- (a) LSBC, online: <<http://www.lawsociety.bc.ca/>>.
- (b) LSA, online: <<http://www.lawsocietyalberta.com/>>.
- (c) Law Society of Saskatchewan, online: <<http://www.lawsociety.sk.ca/>>.
- (d) Law Society of Manitoba, online: <<http://www.lawsociety.mb.ca/>>.
- (e) LSUC, online: <<http://www.lsuc.on.ca/>>.
- (f) Barreau du Québec, online: <<http://www.barreau.qc.ca/>>.
- (g) Chambre des notaires du Québec, online: <<http://www.cdnq.org/>>.
- (h) Law Society of New Brunswick, online: <<http://www.lawsociety-barreau.nb.ca/>>.
- (i) Nova Scotia Barristers' Society, online: <<http://www.nsbs.ns.ca/>>.
- (j) Law Society of Prince Edward Island, online: <<http://www.lspei.pe.ca/>>.
- (k) Law Society of Newfoundland & Labrador, online: <<http://www.lawsociety.nf.ca/>>.
- (l) Law Society of Yukon, online: <<http://www.lawsocietyyukon.com/>>.
- (m) Law Society of the Northwest Territories, online: <<http://www.lawsociety.nt.ca/>>.
- (n) Law Society of Nunavut, online: <<http://lawsociety.nu.ca/>>.

B. ETHICS, LAWYERING AND PROFESSIONAL REGULATION

This section of the course addresses the general roles and responsibilities of the lawyer that arise in many, and in some cases all, aspects of the practice of law. The next part examines the obligations of lawyers in some specific practice contexts.

1. The Lawyer-Client Relationship

This section of the course starts with a consideration of the Lawyer-Client relationship itself, including the creation of the relationship, the factors that influence and motivate lawyers and clients in this relationship, the general obligations of lawyers in the relationship and the circumstances that lead to the termination of the relationship. Throughout the discussion are various obligations, generated by law or by Codes of Professional Conduct, which are expected to frame and guide the lawyer's conduct.

Issues to Consider:

- (a) When does a lawyer-client relationship come into existence?
- (b) What choices are available to the lawyer with respect to accepting clients?
- (c) What significance, for the lawyer and for the client, is the existence of the relationship?
- (d) What obligations for the lawyer arise as a result?
- (e) What are the motivations of lawyers, and the techniques they use, to acquire clients?
- (f) Are all of these motivations and techniques appropriate?
- (g) What larger values do they advance or undermine?
- (h) What circumstances lead to the termination of the relationship and what are the implications for the lawyer? For the client?

Required Readings:

- (a) Casebook, Chapter 3.
- (b) *Model Code*, "Preface", "Definitions", Chapter 3.

⁽¹¹⁾ These optional links are provided simply for students' information regarding regional regulatory policies and requirements. See further *supra* note 3.



Further (Optional) Materials:

- (a) Law Society of Alberta ("LSA"), *Code of Conduct*, "Preface", online: LSA <<http://www.lawsociety.ab.ca/lawyers/regulations/code.aspx>>.
- (b) LSUC, *Rules of Professional Conduct*, rr. 1.02 ("client", "lawyer"), 1.03(1)(a)-(b), 2, 4, online: LSUC <<http://www.lsuc.on.ca/with.aspx?id=671>>.
- (c) Law Society of British Columbia ("LSBC"), *Professional Conduct Handbook*, ch. 1, online: LSBC <<http://www.lawsociety.bc.ca/page.cfm?cid=383&t=Professional-Conduct-Manual>>.
- (d) ABA, *Model Rules of Professional Conduct*, "Preamble and Scope", online: ABA <<http://www.abanet.org/cpr/mrpc/preamble.html>>.

2. Client Confidences

This section addresses the lawyer's obligation to preserve the confidences of his or her client. It examines the centrality of this obligation in virtually all lawyer-client relationships and the reasons for its importance, both in individualized terms between individual lawyers and clients and in systemic terms related to the functioning of the justice system as a whole. The section examines the sources of the lawyer's obligations, the legal and ethical features of the obligations and the circumstances where exceptions to the obligations have been established.

Required Readings:

- (a) Casebook, Chapter 4
- (b) *Model Code*, Chapter 3, Rule 3-3 and Commentaries; Rule 3-5(6) and Commentary; Rule 3-7 and Commentaries.
- (c) LSUC, Special Committee on Lawyer's Duties with Respect to Property Relevant to a Crime or Offence, "Report to Convocation" (21 March 2002), online: LSUC <http://www.lsuc.on.ca/media/convmay02_propertyrelecrime.pdf>.

3. Conflicts of Interest

One of the most important obligations of lawyers in any context is to avoid conflicts of interest. This subject has been extensively addressed by Canadian courts and by the legal profession itself in efforts to ensure that clients and others have confidence in the appropriateness of lawyer representation of clients and, correspondingly, in the administration of justice itself. These obligations have placed lawyers in difficult situations and have had significant implications for client representation. As well, they have more than in most other areas of legal ethics, engaged the question of whether the practice of law is a business or a profession.

Issues to Consider:

- (a) Origins of conflicts of interest.
- (b) Sources and types of conflicts of interest: ethical, legal, economic, etc.
- (c) Client loyalty.
- (d) Changing firms: potential conflicts involving law students and lawyers.
- (e) Avoiding conflicts.
- (f) Remedies.
- (g) The implications for lawyers, clients and the administration of justice.
- (h) Is the current balance – largely framed for example by the Supreme Court of Canada in *Martin*, *Neil*, *Strother* and now *Wallace* – fair? Efficient?



Required Readings:

- (a) Casebook, Chapter 5.
- (b) *Model Code*, Chapter 4, Rule 3-4 and Commentaries.
- (c) Adam Dodek, "Conflicted Identities: The Battle over the Duty of Loyalty in Canada" Legal Ethics, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1964458>.

4. The Adversary System and Lawyers as Advocates

Issues to Consider:

- (a) The adversary system and its impact on professional obligations.
- (b) Lawyers as advocates.
- (c) Lawyers as counselors.
- (d) Truth and rights.
- (e) Candour.
- (f) Zealous representation.
- (g) Duties to clients, opposing counsel, the court, other parties (including un-represented litigants) and society.
- (h) Civility.
- (i) Document production.
- (j) Trial tactics, evidence and disclosure.
- (k) Witness preparation, conduct and perjury.

Required Readings:

- (a) Casebook, Chapter 6.
- (b) *Model Code*, Chapter 5, Chapter 3, Rule 3.7 and Commentaries.
- (c) *Blank v. Canada* (Minister of Justice), [2006] 2 S.C.R. 319, 2006 SCC 39.

C. SOME SPECIFIC PRACTICE AREAS

There are different practice areas and contexts in the Canadian legal profession, including, for example, criminal law, corporate law, family law, general civil litigation, poverty law, government lawyering, in-house counsel, etc. This section of the course aims to achieve at least the following: (i) to give students an appreciation of the range of obligations to clients, and the limits to these obligations, that arise in some of these various lawyering roles and contexts; (ii) to introduce students to the ways in which certain roles of lawyers have very specific, sometimes unique ethical and professional obligations associated with them in Canada; and (iii) to examine and critique these various obligations in the context of some of the overarching principles discussed in the initial parts of the course.

General Issues to Consider:

- (a) Is there a difference from an ethical perspective between the various practice areas and contexts?
- (b) Should there be?
- (c) Does the *Model Code* adequately contemplate these various practice situations?



1. Ethics and Alternative Dispute Resolution

Issues to Consider:

- (a) Lawyer as negotiator, mediator and arbitrator.
- (b) Disclosure obligations.
- (c) Lies, misrepresentations and misleading truths: is there a difference?
- (d) Conflicts of interest.
- (e) Confidentiality.
- (f) Are adversarial rules helpful?
- (g) Expanding nature of legal services.
- (h) Collaborative lawyering.

Required Readings:

- (a) Casebook, Chapter 7.
- (b) *Model Code*, “tribunal”, Chapter 3, Rule 3-2(2) and Commentary; Chapter 5, Rule 5-7 and Commentaries; Chapter 7, Rule 7-2 and Commentaries.

Further (Optional) Materials:

- (a) LSA, *Code of Professional Conduct*, chs. 9(16), 11, online: LSA <<http://www.lawsociety.ab.ca/lawyers/regulations/code.aspx>>.
- (b) *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178, 2003 SCC 17 at para. 41.
- (c) Trevor C. W. Farrow, “The Negotiator as Professional: Understanding the Competing Interests of a Representative Negotiator” (2007) 7 *Pepperdine Dispute Resolution Law Journal* 373 (a draft version of which is available online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=967495>).

2. Ethics and the Practice of Criminal Law

Required Readings:

- (a) Casebook, Chapter 8.
- (b) *Model Code*, Chapter 3, Rule 3.5-6 and Rule 3.5-7 and Commentaries; Chapter 5, Rule 5-1 and Commentaries.
- (c) Austin M. Cooper, Q.C., “The ‘Good’ Criminal Law Barrister”, online: LSUC <http://www.lsuc.on.ca/media/austin_cooper_good_criminal_lawyer_mar0504.pdf>.

3. Lawyers in Organizational Settings: Corporate Counsel

Required Readings:

- (a) Casebook, Chapter 9.
- (b) *Model Code*, Chapter 3, Rule 3.2-3 and Commentary.

4. Government Lawyers

Required Readings:

- (a) Casebook, Chapter 10.
- (b) *Model Code*, Chapter 7, Rule 7-4 and Commentaries.



D. ACCESS TO JUSTICE

This final part of the course looks at the delivery of legal services. Students should specifically consider various access problems, potential remedies and the role of lawyers and the profession with regard to issues of access to legal services in particular, and access to justice more generally.

Issues to Consider:

- (a) Access to legal services.
- (b) Who should pay: clients, their lawyers and/or society?
- (c) What are the problems and possible solutions?
- (d) *Pro bono* obligations.
- (e) Legal aid.
- (f) Community clinics.
- (g) Legal fees.
- (h) Insurance and pre-paid legal regimes.
- (i) Contingency fees.
- (j) Paralegals.
- (k) Class actions.

Required Readings:

- (a) Casebook, Chapter 12.
- (b) *Model Code*, Preface; Chapter 3, Rule 3.1 and Commentaries; Chapter 5, Rule 5.6-1 and Commentary; Chapter 7, Rule 7.6 and Commentaries.
- (c) CBA, "Legal Aid", online: <<http://www.cba.org/CBA/Advocacy/legalAid/>>⁽¹²⁾

Further (Optional) Materials:

- (a) CBA, "Pro Bono", online: CBA <<http://www.cba.org/cba/groups/probono/>>.
- (b) Action Committee on Access to Justice in Civil and Family Matters, Working Group Reports, online: Canadian Forum on Civil Justice <<http://www.cfcj-fcjc.org/collaborations>>⁽¹³⁾

- End of Course -

⁽¹²⁾ Students should simply skim the various materials and publication links collected on this website to become aware of some of the problems and potential policies and solutions. Students are not required to read all of these documents in significant detail.

⁽¹³⁾ Students should simply skim the various materials and publication links collected on this website to become aware of some of the problems and potential policies and solutions. Students are not required to read all of these documents in significant detail.



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Online Resources

The majority of case law and legislative resources needed by NCA students are available on CanLII, the free legal information resource funded by the Federation of Law Societies of Canada (www.canlii.org). That includes all decisions of the Supreme Court of Canada, and all federal, provincial, territorial and appellate courts.

Your registration fee also includes free access to the Quicklaw resources of Lexus Nexis. Access requires a unique User ID and password, which will be emailed to you once you have completed registration for NCA exams (www.lexisnexis.com/ca/legal). The first time you sign in to Quicklaw you will be asked to change or personalize your password. Remember your User ID and password are personal, and should not be shared with anyone.

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